

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

UNITED STATES OF AMERICA))
v.) 1:19-cr-00007-JAW
DOUGLAS GORDON)

DEFENDANT’S OPPOSITION TO THE GOVERNMENT’S MOTION *IN LIMINE* TO
USE A SUMMARY CHART AS ADMISSIBLE EVIDENCE DURING TRIAL

NOW COMES the Defendant, by and through undersigned counsel, and hereby OPPOSES the Government's Motion *in Limine* to use a summary chart as admissible evidence during Trial. For the reasons stated below, and because the summary chart is neither accurate nor reliable, and contains on its face, nearly one-hundred erroneous entries and misleading entries, as well as the fact that no proper foundation has been laid, this Honorable Court should deny the Government's Motion and preclude admission of the summary chart at trial.

I. BACKGROUND

The relevant background underlying this Opposition is found within the Government's Motion *in Limine*, which states, in pertinent part:

In order to show the number of DVD copies of movies that were *ordered* from the three websites, the Government intends to offer in its case-in-chief a summary chart. *See* Govt. Exh. No. 1. The chart summarizes information obtained from approximately 23,080 emails automatically generated when customers made *online orders* with use of the Defendant's www.findraredvds.com website. Spreadsheets provided by Weebly, the host of the Defendant's www.lostmoviesfound.com website, contain approximately 18,436 lines of data likewise showing *online orders* made by customers for movie DVDs. Two Kunaki LLC accounts include more than

4,800 additional lines of data regarding *customer orders* made on his third website, www.lostmoviefinder.com. Since the number of e-mails and lines of data on the spreadsheets are voluminous, the Government is offering the attached summary chart pursuant to Federal Rule of Evidence 1006. During the case-in-chief, the chart will be introduced through the testimony of Special Agent Loren Thresher, the case agent who analyzed information and created the chart.

Gov't Mot. *In Limine* at 2 (emphasis added and footnotes omitted).

II. LEGAL STANDARD

Fed. R. Evid. 1006 provides in relevant part “[t]he proponent may use a summary, chart, or calculation to prove the contents of voluminous writings, recordings, or photographs that cannot be conveniently examined in court.”

There are five preconditions before admitting a summary chart pursuant to Fed. R. Evid. 1006: 1) the documents must be so voluminous that they cannot conveniently be examined in court; 2) the proponent of the summary chart must have made the documents available for inspection and copying at a reasonable time and place; 3) the proponent must establish that the underlying documents are admissible in evidence; 4) the chart must be accurate and non-prejudicial; and 5) the chart must be properly introduced before it is admitted into evidence. *U.S. v. Bray*, 139 F.3d 1104, 1109-1110 (6th Cir. 1998); *see also United States v. Milkiewicz*, 470 F.3d 390, 397-398 (1st Cir. 2006) (citing to *Bray*).

III. ARGUMENT

As a preliminary matter, the Defendant notes that solely for the purposes of this Motion, he will solely focus on the fact that the chart is not accurate and is prejudicial, and that there is insufficient testimony from the chart’s creator, Special

Agent Thresher, for the Court to make a preliminary ruling on the chart's admissibility.

A. The Summary Chart is Neither Accurate Nor Reliable, and Therefore, is Prejudicial to the Defendant.

Turning Defendant's first argument, the summary chart proffered by the Government and labeled Gov't Ex. 1, allegedly is created from e-mails automatically generated when customers made *online orders* on three websites allegedly linked to Defendant. When looking at the chart itself, however, the chart lists the following titles that *were not ordered* from any of the websites:

1. *29th Street 1991 DVD;*
2. *A Cold Nights Death 1973 DVD;*
3. *A Mom For Christmas 1990 DVD;*
4. *A Muppet Family Christmas 1987 DVD;*
5. *A Woman at War 1991 DVD;*
6. *Abraham Lincoln 1930 DVD;*
7. *Action an Anguar 1945 DVD;*
8. *Africa Screams 1949 DVD;*
9. *After the Beep 1998 DVD;*
10. *Agent on Ice 1986 DVD;*
11. *Alice's Restaurant 1968 DVD;*
12. *All the Kind Strangers 1974 DVD;*
13. *Amerika 1987 DVD;*
14. *Angel and the Badman 1947 DVD;*
15. *At Play In the Fields of the Lord 1991 DVD;*
16. *At War with the Army 1950 DVD;*
17. *Attack of the Giant Leeches 1959 DVD;*
18. *Bare Essentials 1991 DVD;*
19. *Beauty and the Beast 1991 DVD;*
20. *Becky Sharp 1935 DVD;*
21. *Blind Man's Bluff 1992 DVD;*
22. *Blood Salvage 1990 DVD;*
23. *Blue Monkey 1987 DVD;*
24. *Breaking All the Rules 1985 DVD;*
25. *Cage 1989 DVD;*
26. *Cage II: The Arena of Death 1994 DVD;*

27. *Care of Game Animals: Field to Freezer* DVD;
28. *Cocaine Blues* 1983 DVD;
29. *Coldblooded* 1995 DVD;
30. *Dark Night of the Scarecrow* 1981 DVD;
31. *Day of the Beast* 1995 DVD;
32. *Deadtime Stories* 1986 DVD;
33. *Death Squad* 1974 DVD;
34. *Dinosaur Island* 1994 DVD;
35. *Dot and Keeto* 1986 DVD;
36. *Dream Demon* 1988 DVD;
37. *Fast Break* 1979 DVD;
38. *Final Round* 1993 DVD;
39. *FM* 1978 DVD;
40. *Gentle Giant* 1967 DVD;
41. *Grand Tour: Disaster in Time* 1992;
42. *Grim Prairie Tales* 1990 DVD;
43. *Halloween with the New Addams Family* 1977 DVD;
44. *Happily Ever After* 1990 DVD;
45. *Hollywood Hot Tubs 2: Educating Crystal* 1990 DVD;
46. *Homewrecker* 1992 DVD;
47. *Honeymoon Horror* 1982 DVD;
48. *Hurricane* 1937 DVD;
49. *I Bury the Living* 1958 DVD;
50. *Journey Back to Oz* 1975 DVD;
51. *Ketchup Vampires 2* 1996 DVD;
52. *Laboratory* 1980 DVD;
53. *Loving You* 1957 DVD;
54. *Massacre at Central High* 1976;
55. *Mission Stardust* 1968 DVD;
56. *My Man Adam* 1985 DVD;
57. *Night of the Living Dead* 1968 DVD;
58. *No Retreat, No Surrender* 1986;
59. *Orion's Belt* 1985 DVD;
60. *Out There* 1995 DVD;
61. *Payback* 1995 DVD;
62. *Pet Shop* 1995 DVD;
63. *Photographing Fairies* 1997 DVD;
64. *Poor Little Rich Girl: The Barbara Hutton Story* 1987 DVD;
65. *Prom Night* 1980;
66. *Robin of Locksley* 1996 DVD;
67. *Rumpelstiltskin* 1987 DVD;
68. *Saints and Sinners* 1994 DVD;
69. *Snow Treasure* 1968 DVD;

70. *Strange America: Unclassified* 2000 DVD;
71. *Stubby Pringle's Christmas*;
72. *Ted Bundy* 2002 DVD;
73. *The Adventures of Timmy the Tooth* 1995 DVD;
74. *The Amazing Mr X.* 1948 DVD;
75. *The Animal Kingdom* 1932 DVD;
76. *The Ann Jillian Story* 1988 DVD;
77. *The Boyfriend School* 1990 DVD;
78. *The Great Love Experiment* 1983 DVD;
79. *The Hit List* 1989 DVD;
80. *The Lightening Incident* 191 DVD;
81. *The Little Shop of Horrors* 1960 DVD;
82. *The Midnight Hour* 1985 DVD;
83. *The Pope Must Diet* 1991 DVD;
84. *The Rainmaker* 1997 DVD;
85. *The Secretary* 1995 DVD;
86. *The Stepford Wives* 1975 DVD;
87. *Uptown Saturday Night* 1974; and
88. *Warrior Queen* 1987 DVD.

Of these 88 titles, at least three, according to the spreadsheet, were not listed on any of the three websites:

1. *Halloween with the New Addams Family* 1977 DVD;
2. *Ketchup Vampires 2* 1996 DVD; and
3. *Stubby Pringle's Christmas*.

In addition, on pages eight and nine of the spreadsheet, the document lists titles that were not listed on FindRareDVDS, as of February 11, 2015, LostMoviesFound, as of January 30, 2017, or LostMovieFinder, as of January 23, 2019, however, the spreadsheet indicates that many orders were placed for these movies. It is unclear, and confusing, as to how these orders were placed if the movies were not listed on the respective websites, and whether the purchases predated the dates listed on the spreadsheet, February 11, 2015, January 30, 2017, and January 23, 2019. These titles constitute an additional 21 titles to the 88 listed above.

As shown above, Defendant submits that the summary chart should not be admitted into evidence, and rejected as inaccurate and unreliable, because it was supposedly created from online orders, but contains 88 movies that were not ordered; contains three titles that were not listed on any of the three websites; and contains 21 titles that were not listed on any of the three websites but which had many online orders. Accordingly, Defendant submits that he has identified well over 100 inaccuracies and misleading and confusing statements with the Government's Exhibit 1. Therefore, the exhibit is neither accurate nor reliable, and Defendant would be prejudiced by its admission. For these reasons, the Court should deny the Government's Motion *in Limine*.

B. There is Insufficient Foundation or Testimony from Special Agent Thresher to Support Admission of the Summary Chart

In light of the serious and fatal flaws in the Government's Exhibit 1 mentioned above, and to the extent this Honorable Court is inclined to overlook over one-hundred inaccuracies, errors, and misleading statements within the chart, Defendant submits that it is improper for the chart to be admitted at this time, because Special Agent Thresher has not yet provided foundational testimony to support its admission and to explain his research, process, findings, and how the chart itself was created. *See Bray*, 139 F.3d 1104, 110 ("In order to lay a proper foundation for a summary, the proponent should present the testimony of the witness who supervised its preparation.").

The Government's Motion seeks to sidestep this requirement by obtaining a preliminary ruling on the chart's admissibility, and this Court should deny Defendant's Motion or refrain from ruling on it until it has heard the foundational testimony of Special Agent Thresher.

DATED: August 16, 2019

s/Stephen C. Smith
Stephen C. Smith Bar No. 8720
Attorney for Defendant
LIPMAN & KATZ
PO Box 1051
Augusta, ME 04332-1051
207-622-3711
ssmith@lipmankatz.com

CERTIFICATE OF SERVICE

I, Stephen C. Smith, hereby certify that the foregoing Defendant's Opposition to Government's Motion in Limine that Exhibits Qualify as Admissible Records under Rule 803 has been electronically sent to AUSA James M. Moore for the Office of the United States District Attorney on this 16th day of August, 2019.

James M. Moore, AUSA
jim.moore@usdoj.gov

DATED: August 16, 2019

s/Stephen C. Smith
Stephen C. Smith Bar No. 8720
Attorney for Defendant
LIPMAN & KATZ